United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1406

-CORRECTED COPY-

UNITED STATES COURT OF APPEALS

For The Second Circuit

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P/S

IN THE MATTER OF

THE GRAND JURY SUBPOENA

SERVED ON JOHN DOE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANTS

Issue Presented

Is the District Court powerless, during the pre-indictment grand jury stage of proceedings, to halt or grant any remedy against prosecutorial misconduct which violates the Sixth Amendment rights to effective assistance of counsel?

Preliminary Statement

This is an appeal by X Corporation, Richard Roe and John Doe* from the unreported memorandum and order of the District Court (Haight, J.), dated September 9, 1976, denying,

* By order of this Court entered on September 22, 1976, all prior papers herein were ordered sealed and the parties directed to use the above aliases in lieu of the actual names, to avoid any prejudice to them. In addition, appellants were granted an expedited appeal.

as a matter of law and without any evidentiary hearing, appellants' motion for injunctive and other relief against the United States Attorney and the grand jury. The relief had been sought in view of prosecutorial misconduct and violation of Sixth Amendment rights of X Corporation and Roe, two targets of a grand jury investigation, through the prosecutors' misuse of grand jury process, allegedly issued in connection with a separate grand jury investigation.

Relevant Facts and Proceedings Below

A. The Factual Background

1. The Grand Jury Investigation Directed Against X Corporation and Roe

On July 30, 1976, Assistant United States Attorney Thomas E. Engel informed counsel for X Corporation and Roe that those clients were targets of a grand jury investigation then being conducted in the Southern District of New York into violations of the Internal Revenue Code (X Corporation and Roe are hereinafter at times referred to as "the targets") (Walpin Aff. 8/27/76, at 2; Engel Aff. 9/3/76, at ¶3). These violations apparently relate, at least in part, to alleged wrongful obtaining of money which had not been reported to the Internal Revenue Service.

2. Counsel's Retainer of Doe, an Investigator-Attorney

Counsel for the targets, on August 6, 1976, retained John Doe, an investigator-attorney, to assist counsel in the investigation and preparation of the defense of the targets in the grand jury matter and of X Corporation in a civil litigation between that corporation and one Philip Poe (Walpin Aff. 8/27/76, at 3).

3. The Investigative Responsibility Assigned to Doe

Doe was instructed by counsel to obtain factual information relevant to the grand jury investigation and the civil litigation (Ibid.). As is clear from the record, Doe was instructed to obtain facts concerning Poe and his finances (Walpin Reply Aff. 9/7/76, at 3; Transcript of 9/8/76 Hearing at 21).

Poe had been a former employee of X Corporation who was, unknown to the targets or their counsel, apparently cooperating with the United States Attorney in connection with the allegations of internal revenue violations made against the targets (Transcript of 8/27/76 Hearing at 5). Poe was also the claimant in the civil litigation, mentioned

above, against X Corporation.* While not expressly stated in the record below**, it was implicit that counsel for the targets assigned Doe the responsibility of obtaining all relevant facts concerning Poe and his financial condition which would demonstrate that any wrongful obtaining of money, which had not been reported to the Internal Revenue Service, had been done by Poe for his own benefit and that, when he was questioned about the scheme, he put the blame on Roe and X Corporation in an attempt to save himself from prosecution.

Based on certain facts then known to the targets' counsel, to which Doe was given access, Doe commenced his investigation by making inquiries concerning Poe (Walpin Aff. 8/27/76, at 3; Transcript of 9/8/76 Hearing at 21). For example, accord-

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* The record below refers to the existence of this civil litigation, without expressly identifying Poe as the claimant. However, the close relationship between the facts relevant to the grand jury investigation and that civil litigation is indicated in the retention of Doe by counsel to perform investigative work for both proceedings (Walpin Aff. 8/27/76 at 3). Obviously, Poe's status as claimant in that civil litigation would have expressly been established in an evidentiary hearing.

** The attorneys' work-product privilege, which the Government conceded below covered the information obtained by, and investigative activities of, Doe, an attorney-investigator retained by counsel, of course precluded a full disclosure of all such information. See In re Terkeltoub, 256 F. Supp. 683 (S.D.N.Y. 1966). Thus, certain conclusions and investigative tactics set forth above are implicit, rather than express, in the record.

ing to the Government,* Doe had inquired of the tenant in a house formerly or then owned by Poe, concerning Poe's ownership of the house and as to whether any of Poe's records remained in the house (Engel Aff. 9/3/76, at ¶6).

B. The Service of A Subpoena on Doe

1. Steps Taken By Poe To Halt Doe's Investigation

Obviously troubled by word that an investigator for the targets' counsel was attempting to obtain facts concerning him, Poe had his attorney, on August 24, 1976, advise an Assistant United States Attorney (Thomas M. Fortuin) that "his client's wife said she had been intimidated by a man named Doe." (Id. at ¶5). Assistant United States Attorney Fortuin communicated this information to Assistant United States Attorney Engel, the assistant in charge of the investigation, who was then vacationing in Massachusetts (Ibid.). The latter telephoned Poe's attorney who stated that his client's wife had told him "that a man named John Doe, who held himself out as a lawyer, had been speaking to" the present tenants in the Poe home, concerning the ownership

* While appellants did not concede the accuracy of the Government's representations as to the specific inquiries alleged to have been made by Doe, appellants agreed that Doe had made inquiries about Poe (Transcript of 9/8/76 Hearing at 21). Since the policy behind the work product privilege precluded appellants' disclosure of the exact inquiries made by Doe, it is sufficient here to exemplify the type of inquiries made by reference to this example in the Government's recitation.

of that house and other facts relevant to Poe (Id. at ¶6). Further, Poe's attorney stated that Doe "had inquired of neighbors about Poe's children, to wit: where they lived, where they went to school, and how old they are."* (Id. at ¶7).

Poe's attorney concluded that "as a result of hearing of these inquiries, Mr. and Mrs. Poe were apprehensive about their own safety and that of their children."** (Id. at ¶3).

2. Issuance of the Obstruction of Justice Subpoena to Doe

Up to this point, AUSA Engel had only third-hand information from Poe's attorney. AUSA Engel did not speak directly to Mr. or Mrs. Poe and had no reason to believe

* Appellants have not and do not concede the accuracy of this statement. See transcript of 9/8/76 Hearing at 21; Walpin Reply Aff. 9/20/76, at 4n.

** Engel's affidavit below reflected that Poe's attorney was aware of Roe's "previous criminal record for failing to file income tax returns" and that Poe's attorney also informed the Government that Roe "had 'organized crime' connections." (Engel Aff. 9/3/76, at ¶8). The relevance of these allegations was never established, since the Government never even suggested that Mr. or Mrs. Poe was aware of such facts to contribute to their alleged apprehension. Moreover, the court records demonstrated the inaccuracy of the nature of the criminal record. (Walpin Reply Aff. 9/7/76, at 4). And no basis was ever offered to support the "organized crime" allegations; significantly, the Government does not claim it knows of any facts to warrant that allegation. One must wonder about the validity of such allegation when it is a private attorney who informs the Government, which has been investigating Roe, that Roe had organized crime connections.

that Doe had spoken or sought to speak directly with Mr. or Mrs. Poe. Nor did AUSA Engel attempt then to speak directly with any of the persons of whom Doe had made inquiry (Id. at ¶11).

Indeed, if we accept the Government's representations of information given by Poe's attorney as to the inquiries made by Doe, the Government at this point was unaware of for whom Doe was working and did not know that Doe had any connection with the X Corporation, Roe, or their attorneys.* In other words, based on what the Government now says, it then knew too little about Doe even to have a reasonable suspicion that he might be attempting to obstruct justice.

Yet, accepting the Government's representations at face value, on the basis of third-hand information given by an attorney for Poe, and without knowing whether Doe, an attorney, had any relation to the grand jury investigation, AUSA Engel immediately telephoned AUSA Fortuin and told him "to draw a subpoena addressed to Mr. Doe and returnable August 31, 1976." (Id. at ¶11).

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* We show infra p. 22 that it appears likely that the Government in fact knew Doe's connection with the preparation of the targets' defense.

The next evening, August 25, 1976, Doe was served at his residence with a grand jury subpoena, requiring his attendance at the grand jury on August 30, 1976 at 2:00 p.m.

3. Communications With the Assistant United States Attorney

Immediately after receipt of the subpoena, Doe called the Assistant United States Attorney whose name appeared on the subpoena, AUSA Fortuin, and requested to know the reason for the subpoena. All that Mr. Fortuin would state was that the subpoena was for obstruction of justice in connection with an Internal Revenue Service investigation, that Mr. Doe was a possible subject, and that therefore he would probably need an attorney (Walpin Aff. 8/27/76, at 4).

The following morning, August 26th, counsel, by whom Doe had been employed, telephoned AUSA Fortuin and was advised that the investigation involved serious allegations of obstruction of justice. Counsel stated that Doe had been retained by him as an attorney to investigate certain facts in connection with the defense of the targets and that, therefore, he believed that an explanation was required as to why the United States Attorney's Office would subpoena into the grand jury an attorney-investigator working for an

attorney defending targets of an on-going grand jury investigation. AUSA Fortuin said that he did not believe that any explanation was required but that he would attempt to learn some details. When asked to furnish any details he then had, AUSA Fortuin replied that, although he had issued the subpoena, he really did not know any details. Rather, he would have to obtain them from AUSA Engel, whose case it was, and he would do so and communicate with the targets' counsel on the following morning (August 27th) (Ibid.).

On August 27th, AUSA Fortuin refused to give any details, stating he now desired to wait until the following Monday (August 30th) (Id. at 4-5).

C. The Order To Show Cause

On August 27th, the District Court (Werker, J.) signed an order to show cause, substantially in the form requested by appellants, after hearing counsel for the Government and for appellants.

The order required the United States Attorney to show cause on September 8, 1976, why an order should not be entered

(a) Quashing the grand jury subpoena served on John Doe on August 25, 1976;

(b) Enjoining the United States Attorney and the Grand Jury from proceeding with the investigation of X Corporation and/or Richard Roe;

(c) Enjoining the United States Attorney, the Grand Jury, or any of his or its agents, from further interference with the investigation by and on behalf of counsel for X Corporation and/or Richard Roe;

(d) Suppressing testimony and/or evidence relevant to the matters being investigated by John Doe; and

(e) Granting such other and further relief as to that Court seems just.

Pending the hearing and determination, the District Court stayed all proceedings pursuant to and required by the subpoena served on Doe (Order to Show Cause at 2).

During the hearing preceding Judge Werker's signing of the order to show cause, the Government conceded "that it

would be an outrageous event for the United States Attorney's Office to use the grand jury subpoena power to in any way inhibit the [targets'] preparation of a criminal case. . . ." (Transcript of 8/27/76 Hearing at 7).

Following signing of the order, the Court made clear that it was directing that an evidentiary hearing be held on September 8th, the return date inserted by the Court in the order to show cause.

This direction was given after counsel for appellants had requested such evidentiary hearing

> "to find out . . . what it is the Government had as an alleged basis for this incredible interference with . . . a potential defendant's right to counsel, . . . why the Government did this, and what is the effect, after we learn what they did, on our ability to correct this prejudice." (Id. at 6-7).

When expressly asked by the prosecutor:

> "Do I understand your Honor would wish both sides to be prepared for an evidentiary hearing in Part I as well as a hearing on the affidavits?",

Judge Werker replied

> "I think you ought to be prepared to do that . . . ." (Id. at 12).

D. Prosecutor's Additional Threats

Immediately prior to the hearing at which Judge Werker signed the order to show cause, AUSA Fortuin approached appellants' counsel to suggest that, if counsel claimed that Doe had acted on counsel's instructions, counsel would be admitting that he was guilty of unethical conduct under the Canons of Ethics in attempting "to speak to a person whom he knew to be represented by an attorney." (Walpin Reply Aff. 9/7/76, at 5). The prosecutor reiterated this threat of disciplinary action before Judge Werker, without specifying any factual or legal basis therefor (Transcript of 8/27/76 Hearing at 8).

E. The Government's Pre-Hearing Answering Papers

The Government, in its pre-hearing answering papers, recognized that Doe was within the protection of the attorney's work-product privilege and therefore withdrew the grand jury subpoena (Engel Aff. 9/3/76, at ¶17). However, it expressly reiterated its threat against Doe:

> "the Government will proceed with the investigation of the obstruction of justice without the benefit of Mr. Doe's testimony before the grand jury, and the Government will seek an indictment if the facts, as developed before the grand jury, warrant it." (Ibid.).

Although conceding that Judge Werker had directed that "an evidentiary hearing" be held on appellants' allegations (id. at ¶15), the Government argued that no evidentiary hearing should be held since the withdrawal of the subpoena to Doe had mooted the proceeding (Id. at WHEREFORE clause).*

F. The Hearing Before Judge Haight

On September 8th, the parties, as directed by the order to show cause signed by Judge Werker, appeared before Judge Haight, then sitting in Part I. Judge Haight confirmed that "Judge Werker's order quite clearly calls for an evidentiary hearing today addressed to the issues" (Transcript of 9/8/76 Hearing at 22).** However, the Government, conceding that it was "the first time that the government indeed has been able to put forward" the argument, argued that "no evidentiary hearing should be held" (id. at 3), on

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* The Government also submitted an ex parte affidavit in support of its position, despite Judge Werker's express prior rejection of a suggestion that ex parte presentations be made. Judge Haight, in his memorandum, stated that he had "disregarded and given no weight whatsoever to the in camera affidavit" submitted by the Government. Overruling appellants' request that they be allowed to see that affidavit, Judge Haight returned it to Government's counsel and ordered it "expunged from the record." Memorandum at 11 n.2.

** The Government, for the first time, expressed the view that Judge Werker's order had been improvidently granted (Id. at 11).

the ground that "the District Court is simply without jurisdiction to consider motions to restrain a grand jury . . ." (id. at 4), and that, as a matter of law, "the relief sought is one which the law may not grant" (id. at 11).

Although appellants were then prepared to adduce testimony as part of the evidentiary hearing (id. at 24), the Government, in answer to a question of Judge Haight, stated that, if he ordered the evidentiary hearing to proceed, the Government would walk out and refuse to proceed (id. at 26). Following this colloquy, Judge Haight adjourned the hearing, first until that afternoon, and then subsequently until after the Court filed its opinion which it promised for 4:00 p.m. the following day (Id. at 33).

G. Effect of the Prosecutors' Actions

Following service of the subpoena on him and being advised that he was the target of an obstruction of justice grand jury investigation, Doe advised the District Court, through counsel, that he was unwilling to continue to perform any investigation for X Corporation and Roe since he did not wish "to risk the wrath of the all-powerful Government despite the absence of any wrongdoing on his

part." (Walpin Aff. 8/27/76, at 5). As the court was advised, Doe's position was that one client was not worth all the time and expense which the Government could cause him to expend by the tactic of subpoenaing him into the Grand Jury and harassing him with a grand jury investigation (Transcript of 8/27/76 Hearing at 4). At the hearing before Judge Haight, in Doe's presence,* counsel reiterated Doe's unwillingness to continue as an attorney-investigator on this matter, and summarized the following reasons for his conclusion:

a. The Government's threat to continue to treat him as a target of an obstruction of justice grand jury investigation;

b. The existence of the grand jury investigation against him would undoubtedly filter to other potential clients who would be hesitant to retain him under these circumstances;

c. The outstanding threat would adversely affect his ability to perform a thorough investigation for X Corporation and Roe by causing him to "bend over backwards" in future investigation for them; and

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* Counsel for Doe advised that Doe, who was in Court, was prepared personally to affirm these statements if requested (Transcript of 9/8/76 Hearing at 14).

d. The Government's interviewing of persons to whom Doe made inquiries as part of his investigation could only make them, and other persons acquainted with them, reticent to give any information to Doe, a person being investigated for obstruction of justice.

(Transcript of 9/8/76 Hearing at 14-15).

H. Judge Haight's Memorandum Decision

Without considering the facts to determine whether prosecutorial misconduct or violation of Sixth Amendment rights had occurred, and without holding an evidentiary hearing, the District Court denied the motion solely because it believed itself powerless, as a matter of law, to grant relief at that time if such misconduct was established. The Court explained that its decision was based on its view that the "injunctive and suppressive relief sought by . . . the order to show cause falls beyond the boundaries of a proper exercise of this Court's powers." (Memorandum at 5). And the linch-pin of this conclusion apparently was the failure of appellants "to cite any case in which a district court, exercising its equity powers, has enjoined the continuation of a grand jury investigation

on the basis that the prosecutors are, or may be, guilty of misconduct or abusing the grand jury process." (Id. at 5-6).*

In denying all relief, as a matter of law, on its conclusion that it had no power to interfere with the internal workings of the grand jury, the Court below did not address itself to the portion of the relief requested

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* As this quote shows, the District Court focused solely on the prosecutorial misconduct without also considering the violation of the targets' Sixth Amendment rights.

The decision below, after the factual introduction, reflects and explains the District Court's view that it was without power to grant the relief requested. The one puzzling exception is found on page 11, in the middle of the judicial power discussion where the Court holds that a "colorable basis" existed for the initiation of the grand jury investigation of Doe, and, "under the pertinent principles of law, that is a sufficient basis to deny the motions of X Corporation and Roe. . . ." This cannot be interpreted as a factual finding of no prosecutorial misconduct or violation of Sixth Amendment rights of the targets, since only the preceding day, on the same facts, the District Court had stated that, if it found it had the power to grant relief, it would hold an evidentiary hearing to determine the facts. (Transcript of 9/8/76 Hearing at 33-34). If this sentence were to be considered an alternate basis for its decision, it is clearly erroneous. As shown supra p. 7 , the Government's affidavit contained insufficient facts to indicate an obstruction of justice had or might have occurred. And even if the Government's allegations were held sufficient, no finding could properly be made without affording the targets' counsel the opportunity to elicit testimony and cross-examine the Government witnesses in an evidentiary hearing. See cases cited p. 28 infra.

which sought an injunction against "the United States Attorney, . . . or any of his . . . agents, from further interference with the investigation by and on behalf of counsel for X Corporation and/or Richard Roe."

I. Post-Decision Hearing Before Judge Haight

At a post-decision hearing before Judge Haight on September 10, 1976, sought by appellants "in the hopes of minimizing the prejudice" to X Corporation and Roe, and to enable Doe to resume his investigative activities without the threat of an obstruction of justice investigation, the prosecutors were asked to make "a representation . . . that based on the facts and their review as they now know them, they do not believe there is any reason on their part to continue the obstruction of justice investigation of Mr. Doe." (Transcript of 9/10/76 Hearing at 9).

The prosecutors rejected this option to minimize the prejudice to the targets and to permit Doe to continue his investigative activities. Indeed, to the contrary, the prosecutors reiterated their intention to continue the use of the grand jury to investigate Doe as a target of an obstruction of justice investigation (Id. at 9-10).

Summary Analysis of the Facts

The above facts present, at the very least, a prima facie showing of prosecutorial misconduct and violation of the targets' Sixth Amendment rights to effective assistance of counsel, which has prejudiced them.

Although an evidentiary hearing is required to adduce and understand all relevant facts, the following conclusions therefrom are indicated.

In an attempt to avoid the consequences of his acts as an employee of X Corporation, by which he generated, illegally and without authority, unreported money for his own use, Poe apparently admitted the acts to the Government but clained that he gave the unreported money to Roe and/or X Corporation.

When counsel for X Corporation and Roe was advised of their status as possible targets of an Internal Revenue grand jury investigation, counsel naturally retained an investigator, Doe, to obtain all available facts which would demonstrate that Poe received and retained the unreported funds. Clearly, one area of proof for this purpose involved Poe's financial condition and standard of living.

Just as naturally, Poe did not want counsel for X Corporation and Roe to obtain facts which might indicate that Poe was improperly attempting to transfer responsibility to X Corporation and Roe for the alleged criminal conduct. And as soon as he learned that an investigator retained by counsel for X Corporation and Roe was making inquiries on this subject, he took steps to have such investigation halted: he had his attorney telephone the prosecutor's office and advise that Mrs. Poe was being intimidated by the inquiries being made by Doe.

Acting almost as automatically as an assistant to Poe's counsel, the Assistant United States Attorney opened an obstruction of justice investigation by the grand jury, with Doe the target thereof, and had a grand jury subpoena served on him. The prosecutor did this soley on the third-hand say-so of Poe's counsel, without making any independent inquiries. Indeed, even the few words communicated by Poe's counsel to the prosecutor did not suggest an obstruction of justice violation -- inquiries concerning Poe's ownership of a house lived in by others and concerning Poe's family.*

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* As already noted, we do not concede the correctness of the prosecutors' allegations as to inquiries actually made by Doe, but accept them arguendo for purposes of this brief. Obviously, an evidentiary hearing would be utilized, to the extent necessary, to determine the actual inquiries made by Doe.

Certainly, and limiting the facts to the information which the Government stated it received from Poe's counsel prior to issuance of the subpoena, an attempt by an attorney to obtain information concerning Poe, his style of living, present whereabouts, and financial condition, is clearly not an obstruction of justice.

When the impropriety of their conduct became apparent, the prosecutors attempted to detour the targets from seeking the court's scrutiny of the prosecutors' conduct. First, prior to and at the initial hearing before Judge Werker, the prosecutor implicitedly suggested that counsel should not proceed with a claim that Doe was acting on counsel's behalf -- an essential element of appellants' position that their Sixth Amendment rights had been violated -- by threatening counsel with the possibility of disciplinary action for violation of the Professional Canons if counsel contended that Doe had been acting on his instructions.

Then, at the September 8 hearing before Judge Haight, the Government attempted to avoid the claim that its actions involved prosecutorial misconduct violative of the targets' Sixth Amendment rights, by suggesting that it was "probably" only on the morning of August 26th (when counsel for the

targets called) that the Government knew for "the first time for certain" that Mr. Doe was a private investigator retained by counsel for targets (Transcript of 9/8/76 Hearing at 8). While this would be a factual issue for determination at the evidentiary hearing requested by appellants, the record suggests that either the Government in fact did have such knowledge at the time it issued the subpoena or acted in such disregard of the rights of targets of a grand jury investigation as to amount to prosecutorial misconduct. Inquiries made by an attorney concerning Poe -- even intimidation-type inquiries -- do not give rise to an obstruction of justice unless the Government has reason to believe that the intimidation is in connection with a then pending judicial proceeding.* It is thus reasonable to assume that the Government was aware of the connection of Doe to the targets who themselves had counsel. If, as the Government claims, it was not aware of Doe's relationship to the targets and their counsel, the court is entitled to know the reason the Government issued the subpoena to Doe, an attorney, without at least making some inquiry as to the relationship between Doe's activities and the grand jury

* See United States v. San Martin, 515 F.2d 317 (5th Cir. 1975) (conviction of obstruction of justice reversed where threat made to witness was not made to inhibit future cooperation of witness with government).

investigation of X Corporation and Roe and whether Doe had been retained by the targets' counsel.

Such good faith inquiries, however, would have resulted in the Government's decision not to issue a subpoena to Doe, for, as the Government conceded at the hearing before Judge Haight, Doe "has a privilege which he may assert before the grand jury" (Transcript of 9/8/76 Hearing at 6). Such decision to refrain from serving any subpoena on Doe would not have detoured Doe in his investigation of Poe and thus would not have had the effect clearly desired by the Government and Poe.

Indeed, the Government's actions since the withdrawal of the subpoena, further establish that the Government's interest was, and continues to be, to deprive the targets of the assistance of their investigator-attorney. After conceding that there was no doubt that Doe had been retained by counsel for the targets and had been acting on the instructions of that counsel, the Government still insisted on reiterating its threat to indict Doe for obstruction of justice. Even when, after the decision denying appellants the relief requested, appellants' counsel sought to minimize the prejudice by attempting to arrange Doe's continuation as an investigator

on the case, the Government expressly refused to withdraw its threat of an indictment for obstruction of justice -- and this is even though the Government has never shown -- and, we submit, does not have -- any evidence to indicate that an obstruction of justice occurred.

If, as appellants have alleged and believe an evidentiary hearing would establish, the Government intentionally used the grand jury subpoena power in connection with a separate grand jury investigation to deny X Corporation and Roe the effective assistance of an investigator retained by their counsel, there can be no dispute that this would amount to serious prosecutorial misconduct. Indeed, the Government itself conceded in the initial hearing before Judge Werker "that it would be an outrageous even for the United States Attorney's Office to use the grand jury subpoena power to in any way inhibit the [targets'] preparation of a criminal case. . . ." (Transcript of 8/27/76 Hearing at 7).

Moreover, the prejudice to X Corporation and Roe is apparent. The ability of counsel to retain an investigator to obtain all relevant facts is clearly an integral part of the preparation of a defense.* After having commenced his

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* See United States v. Nobles, 422 U.S. 225, 238 (1975) (in discussing the "realities of litigation in our adversary system," the Supreme Court noted, "One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation

(cont'd)

investigation, Doe understandably did not wish to continue because of the Government's threat hanging over his head. This not only requires the targets to start anew with another investigator, but it will cause such a new investigator to be reluctant to dig for the facts because of what happened to Doe.

THE DISTRICT COURT HAS POWER TO GRANT RELIEF AGAINST PROSECUTORIAL MISCONDUCT VIOLATIVE OF SIXTH AMENDMENT RIGHTS DURING THE PRE-INDICTMENT GRAND JURY STAGE

A. Introduction

The Court below denied appellants' motion solely on the ground that it was without power to grant any relief. In stating that it would have held an evidentiary hearing to determine the existence and extent of prosecutorial misconduct and the prejudice therefrom if it believed it had power to fashion a remedy, (Transcript of 9/8/76 Hearing at

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* (cont'd)
for trial." (emphasis added)); A.B.A. Standards for Criminal Justice, Standards for the Defense Function 4.1, Duty to investigate:

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty." (emphasis added).

34), the District Court indicated that the factual showing made by appellants was sufficient to warrant such a hearing.*

The Court below erred in ruling that the District Courts have no supervisory power over the prosecutor and the grand jury, during the pre-indictment stage, to prevent prosecutorial misconduct in the misuse of grand jury process which interferes with the Sixth Amendment right to counsel of targets of a separate grand jury investigation.

B. The District Court's Responsibility To Supervise The Prosecutor and The Grand Jury

It is axiomatic that the District Courts have supervisory responsibility and power over the prosecutor and the grand jury.

The duty of the District Court to exercise such supervisory powers over the prosecutor where misconduct is established was dismissed in United States v. Banks, 383 F. Supp. 389 (D.S.D. 1974), appeal dismissed sub. nom. United States v. Means, 513 F.2d 1329 (8th Cir. 1975), where the court stated:

> "This court has supervisory powers over the administration of justice. . . . It is my duty to '[establish] and [maintain] civilized standards of procedure and evidence.' . . . This power extends at least to government attorneys and enforcement officers acting within this

* See footnote on p. 17 supra.

> district. . . . The attorneys' and enforcement officers' conduct need not be so unfair or imprudent as to offend 'due process' before exercise of this supervisory power is appropriate. . . . Instead the supervisory power can be utilized whenever the administration of justice is tainted. . . ." Id. at 392.

In Banks, the court dismissed all criminal charges because, after evaluating the evidence relevant to the Government's conduct there, it found the Government had acted in bad faith. The court explained that dismissal of the indictment -- a severe penalty -- was warranted because

> ". . . our society is not bettered by law enforcement that, although it may be swift and sure, is not conducted in a spirit of fairness or good faith." Id. at 397.

Since "the prosecutor . . . had something other than attaining justice foremost in its mind," an order preventing continued prosecution of criminal charges was entered (ibid.). See also United States v. McCord, 509 F.2d 334, 349-350 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 930 (1975) (serious prosecutorial misconduct may require dismissal of indictment without showing of prejudice to defendant); United States v. Heath, 147 F. Supp. 877 (D. Hawaii 1957), appeal dismissed, 260 F.2d 623 (9th Cir. 1958) (government's negligent loss of documents required dismissal of indictment).

This Court's supervisory "interest in enforcing the prophylactic rule" against prosecutorial misconduct "dictates that the facts surrounding [it] be developed in an adversarial context," in which counsel "shall be afforded an opportunity to cross-examine those government witnesses familiar with the circumstances surrounding the" misconduct. United States v. Hilton, 521 F.2d 164, 167-68 (2d Cir. 1975). See also United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973) cert. denied, 417 U.S. 950 (1974), where this Court approved the district court's holding of "an extensive evidentiary hearing at which the prosecutors, the alleged informers and defense counsel testified." Id. at 1224 n.15.*

C. The District Court's Supervisory Responsibility Extends To The Prosecutor and the Grand Jury During The Pre-Indictment Stage

The Court below, while conceding the existence of these supervisory powers in general (Memorandum at 6), found that they did not exist in the pre-indictment stage. In this regard, the Court below erred.

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* This Court also noted in Rosner that where such an evidentiary hearing establishes "government intrusion" of the defendant's right to counsel and the preparation of an adequate defense free from prosecutorial interference, such interference "may justify freeing one guilty person to vindicate the rule of law for others." Id. at 1227.

1. The Power of The Court to Enjoin Prosecutorial Misconduct

As a matter of public policy, the Court should act at any time to halt prosecutorial misconduct brought to its attention. No policy can be served by allowing prosecutorial misconduct to continue unabated until an indictment is handed down. The undisputable statement in Levin v. Clark, 408 F.2d 1209, 1211 (D.C. Cir. 1967), that "Lawless law enforcement should not be tolerated," applies at any stage of the prosecutor's work, not just after indictment. Where there is misconduct by a prosecutor -- an officer of the Court duty-bound to act within appropriate limits -- the very integrity of the judicial system is violated, and the violation is no less if done before indictment than if done thereafter. And it would be an unthinkable affront to that integrity of the judicial system to suggest, as the Government here does, that a district court, with knowledge of continuing prosecutorial misconduct, is powerless to do anything about it unless and until an indictment is returned.

Without directly addressing these policy considerations, the Court below relied heavily on the failure to find "any case in which a district court, exercising its equity powers, had enjoined the continuation of a grand jury investigation

on the basis that the prosecutors are . . . guilty of misconduct or abusing the grand jury process." (Memorandum at 5-6).

Even assuming arguendo an absence of power to enjoin a grand jury -- a conclusion which we show below to be erroneous -- that would not preclude the issuance of an injunction against continuation of misconduct by the prosecutor. As discussed supra, the courts have supervisory responsibility over the conduct of prosecutors. The delegation of such responsibility to the courts without a concurrent grant of power to halt prosecutors' misconduct would be futile. For this reason, the courts may utilize the injunctive power against prosecutors' improper use of grand jury process. E.g., United States v. Finazzo, 407 F. Supp. 1127, 1131-32 (E.D. Mich. 1975).

Among the items of relief requested by appellants, and denied by the Court below on the ground of lack of power to enjoin a grand jury investigation, was a request for an injunction against the United States Attorney to refrain "from further interference with the investigation by and on behalf of counsel for X Corporation and/or Richard Roe." Such relief against a prosecutor is not precluded by a policy against interference with the grand

jury. It should not seriously be contended, and it cannot be accepted, that a policy having as its purpose the independence of the grand jury would immunize the prosecutor from judicial scrutiny and make the courts powerless in the face of prosecutorial misconduct violative of Sixth Amendment rights.

The policy that holds that "courts traditionally refrain from interfering with the internal workings of an on-going grand jury inquiry" (Memorandum at 6) (emphasis in original), on which the Court below relied, is not involved here. Appellants do not seek to interfere "with the internal workings of an[y] on-going grand jury inquiry" by, for example, scrutinizing or limiting the evidence to be heard by a grand jury or the proceedings within the grand jury. Hence the cases cited by the Court below are inapposite since appellants have not asked for disclosure of anything that occurred before the grand jury, to prevent any specific evidence from being given to the grand jury,* or to restrict the use of information obtained in the course of grand jury proceedings.**

* As in United States v. Calandra, 414 U.S. 338 (1974) and Ostrer v. Aronwald, 76 Civ. 3701 (S.D.N.Y. Aug. 31, 1976), cited by the Court below.

** As in In the Matter of the Grand Jury Investigation (General Motors Corp.), 32 F.R.D. 175 (S.D.N.Y.), appeal dismissed, 318 F.2d 533 (2d Cir.), cert. dismissed, 375 U.S. 802 (1963), also cited by the Court below.

Rather, appellants asked the Court to prohibit the prosecutors from "interfering" with the targets' defense on account of prosecutorial misconduct unrelated to the "internal workings" of the initial grand jury investigation, i.e., the prosecutors' initiating of a second and separate grand jury investigation and their misuse of process therefrom -- conduct obviously designed to impede the targets of the first grand jury investigation from preparing their defense.

There is no case which even remotely suggests that this Court is without authority to grant this relief, and neither the Court below nor the Government cited any case in support of such a proposition. For example, if the prosecutor had utilized federal agents to physically intimidate Doe in order to coerce him into halting his investigation, it would be ludicrous to suggest that the policy against interference with grand jury proceedings would require judicial abstention. The fact that the prosecutor here substituted a threat of prosecution and a grand jury subpoena in connection with a separate grand jury investigation which he initiated, instead of a more direct intimidation, as a means for violating the targets' Sixth Amendment rights, does not immunize such conduct from judicial supervision.

2. The Power of the Court To Enjoin A Grand Jury Investigation

Moreover, contrary to the decision below, the federal courts have power to remedy a violation of Sixth Amendment rights in connection with a grand jury investigation. The absence of any reported cases in which a grand jury investigation has been enjoined due to such misconduct does not establish the absence of judicial power to grant such relief. The fact that, after an evidentiary hearing or analysis of undisputed facts, courts have generally denied injunctive relief against an on-going grand jury investigation reflects the reticence of the courts to interfere, absent an egregious misuse of the grand jury.* Indeed, the fact that courts do not deny relief out-of-hand -- as did the Court below here -- but hold an evidentiary hearing or analyze undisputed facts demonstrates that, where an egregious misuse has occurred, the courts have the power to grant appropriate pre-indictment relief.

Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976), clearly demonstrates the

* One explanation for the few cases involving prosecutorial misconduct during the pre-indictment stage is that prosecutors generally do not engage in such misconduct. Another possible explanation is that, given the secrecy of grand jury proceedings, disclosure and proof of prosecutorial misconduct in the pre-indictment stage will seldom be available. But whatever the reason, the paucity of reported cases on the subject is no reason to deny the courts power to deal with pre-indictment prosecutorial misconduct when it in fact is established.

existence of power in the District Court to order an evidentiary hearing and to remedy any prosecutorial misconduct found to exist in the pre-indictment stage. There, as here, the case concerned "allegations of governmental bad faith in connection with a federal grand jury investigation," id. at 1102, where "injunctive relief" was sought "against the continuation of the investigation." Id. at 1103. There, as here, the movant was an unindicted target of a grand jury investigation. If the court had no power to halt the grand jury investigation, there would have been no need for the court to have considered "a considerable number" of affidavits and to have held the evidentiary hearing it held, id. at 1104, and to have spent approximately 30 pages in writing an opinion, the major portion of which evaluated the evidence, in order to conclude that prosecutorial bad faith had not been established there.

Further, the court in Hawthorne expressly affirmed its power to grant relief for prosecutorial misconduct in connection with a grand jury investigation:

> "While the relief to be granted may take various forms, it is plain that the District Court's supervisory power over the grand jury is not limited to granting relief from unreasonable and oppressive grand jury process. Rather, it extends . . . to granting relief from any type of grand jury abuse." Id. at 1115.

In this regard, the court referred to its "equitable power to halt this investigation." Id. at 1116.

Indeed, to paraphrase the court's opinion there: "[w]here the grand jury is used by the government as a cover [to interfere with a potential defendant's Sixth Amendment rights to adequate preparation of counsel], the grand jury process is subverted and relief must be granted." Id. at 1118.

There are other decisions, in which the courts have expressly affirmed their power to grant relief from the prosecutor's abusive misuse of the grand jury process. In each of those cases, the court analyzed the facts presented to determine whether a sufficient showing of prosecutorial misconduct was established to warrant the exercise of the court's supervisory powers. For example:

In re Grand Jury For the November,1974 Term, 415 F. Supp. 242 (W.D.N.Y. 1976): "the court has a responsibility to oversee the work of grand juries and, if particular facts are called to its attention where serious abuse is occurring, there is no doubt that the court would have the right and the responsibility to see to it that fair procedures are followed in grand jury presentations." Id. at 244. There, a motion to discharge the grand jury (i.e., to prohibit continuation of the investigation) was denied not because

the court was powerless to do so but because the only facts submitted in support of the relief requested was "an attorney's affidavit" id. at 244, containing allegations in a "general fashion," id. at 243, which "fail[ed] to set forth in detail any improper conduct by the United States Attorney," id. at 244.*

In The Matter of the Grand Jury Investigation (General Motors Corp.), 32 F.R.D. 175, 181 (S.D.N.Y.), appeal dismissed, 318 F.2d 533 (2d Cir.), cert. dismissed, 375 U.S. 802 (1963): while finding insufficient evidence there, the court indicated that where there is "evidence of the probability of abuse of grand jury process," there is power to intrude into grand jury proceedings "concerning the propriety of a proposed investigation."

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* The court in the above decision also relied on the fact that, since the challenge was, in actuality, to the regularity of the grand jury proceedings, its consideration could await the filing of an indictment. But the instant problem is different in that the charge is that the prosecutor is intentionally misusing the grand jury process through a separate obstruction of justice grand jury investigation in order to violate movants' Sixth Amendment rights in connection with the different tax evasion grand jury investigation. As part of the balancing to be done by the court on applications to restrain the prosecutor's misuse of the grand jury process [see United States v. Calandra, 414 U.S. 338 (1974)], one of the decisive elements is whether the alleged wrong relates solely to the competency, adequacy, and regularity of the grand jury proceeding which might vote an indictment -- a wrong that can be righted following review of the entire grand jury proceeding after an indictment is voted -- or whether the misconduct violated constitutional rights separate from that specific misuse of the grand jury [e.g., Branzburg v. Hayes, 408 U.S. 665 (1972) (separate First Amendment rights)] or there is such misconduct by the prosecutor that it "does violence to both judicial integrity and the interests of justice." In the Matter of John Doe, 410 F. Supp. 1163, 1166 (E.D. Mich. 1976).

See also In re Grand Jury Witness Subpoenas, 370 F. Supp. 1282, 1284 (S.D. Fla. 1974); Application of Iacconi, 120 F. Supp. 589 (D. Mass. 1954).

These decisions, in which the courts weighed whether or not to exercise a supervisory power during the pre-indictment stage, are consistent with the decisions of the United States Supreme Court which have made it clear that, while the courts must afford the grand jury wide latitude to inquire into criminal violations, the grand jury is subject to judicial control to insure that it operates within the limits, and not in violation of, the Constitution. Branzburg v. Hayes, 408 U.S. 665, 708 (1972). Indeed, in referring to the Branzburg decision, involving a claim of violation of First Amendment rights by a grand jury, the Court in United States v. Dionisio, 410 U.S. 1, 12 (1973), expressly noted that "the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression," and recognized the possibility that the Branzburg decision, authorizing judicial control of grand juries, "be extended beyond its First Amendment moorings . . . to a more generalized due process concept."

If, as the government now contends, the federal courts are powerless to control the prosecutor's misconduct in

connection with grand jury proceedings, the above language in Dionisio would have to be interpreted as meaningless puffing by a judicial system which was powerless to prevent "the transformation of the grand jury into an instrument" in violation of "due process."

Again, in United States v. Calandra, 414 U.S. 338, 346 (1974), the United States Supreme Court made clear that judicial supervision may be properly exercised to prevent use of the grand jury to violate a Constitutional right. While the Constitutional right in Calandra was a Fourth Amendment right, there is no basis to assume that a potential defendant's Sixth Amendment right to adequate counsel deserves any less protection from prosecutorial misconduct.

In fact, United States v. Calandra, supra, heavily relied on by the government below, exemplifies the lack of merit of the government's position. That decision, as most of the others relied on by the government below, involved an attack on the use before the grand jury of allegedly illegally obtained evidence. In Calandra, a witness subpoenaed before the grand jury attempted to refuse to answer questions on the ground that they were based on evidence obtained from

an unlawful search and seizure. The Court first explained that the exclusionary rule for illegally seized evidence "has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons;" rather, "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," 414 U.S. at 348. The Court then engaged in a "balancing process" (ibid.) to "weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context." Id. at 349. In doing so, the Court found that "this extension of the exclusionary rule would seriously impede the grand jury," while having an "incremental deterrent effect . . . uncertain at best" on "police misconduct." Id. at 349, 351.*

The facts involved in the balancing in Calandra are not present here. We are not dealing with an uncertain deterrent effect on police behavior in the abstract, but the need to halt present prosecutorial misconduct by prosecutors directly under the supervision of the District Court.

* Ostrer v. Aronwald, 76 Civ. 3701 (S.D.N.Y. Aug. 31, 1976), heavily relied on by the Court below, involved an attempt to prevent evidence from illegal wiretaps from being presented to a grand jury. That decision too is inapposite here. We are not dealing here with a question of the regularity of what is occurring within a grand jury, but the prosecutors' misuse of the process from a second grand jury to violate the Sixth Amendment rights of targets of a different grand jury investigation.

Moreover, the fact that the Court in Calandra engaged in this balancing of interests demonstrates the Court's further recognition that the Government's interest in uninterrupted grand jury proceedings is not absolutely protected from judicial supervision and interference. Rather, evidence establishing the prosecutor's abusive misuse of the grand jury process warrants interference by the court, and the court has the power to fashion a remedy to prevent it.

Conclusion

Since the District Court has power to render pre-indictment relief in appropriate circumstances, this Court should reverse the decision below, and remand with instructions to hold an evidentiary hearing, at which appellants may establish the existence of prosecutorial misconduct and the irreparable prejudice to the Sixth Amendment right of X Corporation and Roe to effective assistance of counsel, following which, if established, the District Court should grant appropriate relief.

Respectfully submitted,

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October 19, 1976

76-1406

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Re: Corrections To Brief For Appellants In
The Matter of the Grand Jury Subpoena
Served on John Doe - Dkt. No. 76-1406

Dear Mr. Fusaro:

Enclosed herewith are ten new copies of the appellants' brief in which the indicated corrections to the following pages have been made:

Page iii - various corrections in the citation of cases;

Page 4 - correction of "Turkeltoub" to "Terkeltoub";

Page 25 - correction to "A.B.A. Standards for Criminal Justice;"

Page 26 - corrections in the quote from and citation of United States v. Banks;

Page 27 - correction of "premost" to "foremost" and in citation of United States v. Heath;

Page 28 - correction of dates in citations of United States v. Hilton and United States v. Rosner;

Page 31 - correction in citation of Ostrer v. Aronwald;

Rec'd 10-19-76

Page 35 - two minor typographical corrections;

Page 36 - corrections in the citation of cases; and correction of typographical error in "judicial";

Page 39 - correction of "severely" to "seriously".

Also enclosed herewith are three copies of this letter.

We apologize for these corrections; the errors were caused by the short time we had to prepare and file the brief.

Please distribute new copies of our brief to the members of the panel who will hear this appeal.

A copy of this letter and two new copies of our brief have been mailed to Assistant United States Attorney Thomas E. Engel.

Sincerely,

Lawrence C. Winger

Lawrence C. Winger

LCW:GG
Enc.